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No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1929

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, DECEASED, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS, PETITIONERS

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

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OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia (R. 90) is reported in 33 F. (2d) 556. The Supreme Court of the District of Columbia decided in favor of the petitioners without opinion. (R. 84.)

JURISDICTION

The decree sought to be reviewed was entered by the Court of Appeals of the District of Columbia on June 3, 1929. (R. 96.) The petition for writ of certiorari was filed August 31, 1929, and was granted on October 21, 1929. (280 U. S. 24A.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION INVOLVED

Under a statute (c. 285, 42 Stat. 1511, 1516) specifically providing that "The Alien Property Custodian is authorized * * * to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any * * * money or other property, or in protecting or administering the same * * * out of the money or other property * * * in respect of which such expenses are incurred, or * * * out of any other money or property held for the same person," was the Alien Property Custodian authorized to deduct from the proceeds of property seized as enemy property, but later held to belong to neutrals, $55,909.83 as expenses for collecting such property and administering the same for about ten years, the amount deducted being two per cent of the amount of the property returned to the owners?

STATUTES INVOLVED

All pertinent statutes and executive orders are quotted in the Appendix, pp. 40–48, *infra*.

STATEMENT

This suit was filed in the Supreme Court of the District of Columbia on December 8, 1921 (R. 1), by Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams under Section 9 of the Trading with the Enemy Act, as amended on June 5, 1920 (c. 241, 41 Stat. 977), by which they sought to recover from the Treasurer of the United States and the Alien Property Custodian the proceeds of the sale of 12,825 shares of the capital stock, together with accrued dividends and earnings upon the proceeds, of the Locomotive Superheater Company, a Delaware corporation, which were seized by the Alien Property Custodian in 1918, during the war between the United States and Germany, under the provisions of the Trading with the Enemy Act, as the property of the Schmidt'sche Heissdampf Gesellschaft, a German corporation (hereinafter referred to as the "German corporation") (R. 26–27, 40–46).

The Alien Property Custodian, after investigation, determined that the German corporation was an enemy not holding a license granted by the President and that it was the owner of 12,825 shares of stock of the Locomotive Superheater Company, a Delaware corporation, and seized the stock as enemy-owned. (R. 43.) The German corpo-

ration concededly was an enemy of the United States within the meaning of the Trading with the Enemy Act, and it is submitted that from the record in this case the Alien Property Custodian had substantial reasons to believe that said German corporation was the owner of said stock. (R. 29–64.) It was only after extended litigation in the preliminary phases of the instant case that the non-enemy ownership of the shares of stock in the petitioners was established. It is not questioned that in seizing and liquidating the property of these petitioners and in the defense of their suit the Alien Property Custodian was acting in good faith.

Jak. Robert Sigg-Fehr died after the suit was instituted, and Henry Escher, as ancillary administrator of his estate, was substituted as plaintiff in his stead. (R. 30.) A motion to dismiss and answer were filed on behalf of the Alien Property Custodian and the Treasurer of the United States on July 10, 1924. (R. 22.) On March 3, 1926, this suit was referred to a Special Master to hear the case and report to the court his findings of fact and conclusions of law together with the evidence. The Special Master filed his report on May 20, 1927 (R. 29), in which he found that the three plaintiffs, Sigg-Fehr, Baumann-Kienast, and Gams, on November 8, 1916, and continuously thereafter up to the time of the filing of the bill of complaint herein were all citizens of the City of Zurich, and that the

plaintiffs were neither enemies nor allies of enemies within the meaning of the Trading with the Enemy Act (R. 30); that on November 8, 1916, Sigg-Fehr, Baumann-Kienast, and Gams, trading as a copartnership, entered into a contract with the German corporation by which they acquired title to said 12,825 shares of the capital stock of the Locomotive Superheater Company (R. 33); that the Alien Property Custodian seized the stock and thereafter sold it to the Director General of Railroads of the United States for $2,656,000; that the present petitioners were entitled to recover the principal; and that they were also entitled to recover the accumulated earnings thereon under the authority of the decision of this Court in the case of *Henkels* v. *Sutherland,* 271 U. S. 298. (R. 63.)

On December 10, 1927, the trial court rendered a memorandum opinion confirming the findings of the Special Master (R. 64), in which it said that, "The Alien Property Custodian, by his seizure, acquired no greater rights than those of the German corporation, and as the Master has found as a fact that the German corporation, under the law of Switzerland, retained no interest, legal or equitable, in the stock, there was no interest that could be seized by the Custodian."

Thereafter, on January 19, 1928, a final decree was entered in the case (R. 65), directing the Alien Property Custodian and the Treasurer of the United States to pay to the plaintiffs "the said

money and other property, or in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and additions and accretions thereto, after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the Trading with the Enemy Act and amendments thereto; and also deducting therefrom the said sum of $10,000.00 to be paid to the Special Master in accordance with this decree." (R. 66.)

No objection to this decree was made by either party.

On February 23, 1928, the attorney for the petitioners executed an acknowledgment of the satisfaction of this decree, except as to certain items, among which was included the following (R. 68):

> (1) The sum of $55,909.83 deducted from the cash held by the Alien Property Custodian and/or the Treasurer of the United States for the plaintiffs herein as an alleged administrative expense.

On March 23, 1928, the present petitioners filed in the Supreme Court of the District of Columbia a petition for rule to show cause why the sum of $55,909.83, deducted from the cash held by the Alien Property Custodian and/or the Treasurer of the United States for them as administrative expenses, as well as certain other items consisting principally of taxes paid to the United

States, should not be forthwith paid over by the Alien Property Custodian and/or the Treasurer of the United States to the petitioners (R. 69), and the rule to show cause was issued on March 23, 1928. (R. 79.) Thereafter, on March 29, 1928, the Alien Property Custodian and the Treasurer of the United States filed a "Motion to Discharge Rule to Show Cause and Answer to Petition" (R. 80–82), in which they admitted "that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83 as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid," and prayed that the rule to show cause be dismissed for the reason that the defendants had fully complied with the decree entered on January 19, 1928.

The plaintiffs then moved to strike the answer from the record on the ground that it was insufficient to justify the admitted refusal to pay the plaintiffs the sum in question and certain other sums not here involved, and asked the court to enter an order directing the defendants to pay over to the plaintiffs, among other things, said sum of $55,909.83. (R. 82.)

Thereafter, on April 2, 1928, the Supreme Court of the District of Columbia, after argument,

entered a decree by which it "adjudged, ordered, and decreed that the deduction of and retention by the defendants of the sum of $55,909.83 as administration expense from the property and moneys due the plaintiffs under the terms and provisions of the decree entered herein on January 19, 1928, is unlawful and without right * * *." (R. 84.)

The claim for the other items set forth in the petition for rule to show cause was duly answered in the "Motion to Discharge Rule to Show Cause and Answer to Petition," but the question of the right of the petitioners to the return of such items was not passed upon by the court in the decree entered on April 2, 1928 (R. 84), and, therefore, was not in issue before the Court of Appeals, and, consequently, is not here in issue.

The Court of Appeals rendered a unanimous opinion on June 3, 1929 (R. 90), reversing the decree of the trial court, and remanded the cause for further proceedings not inconsistent with its opinion. (R. 95.)

SUMMARY OF ARGUMENT

I. The Trading with the Enemy Act authorized the President to appoint an Alien Property Custodian and vested in the President power to seize enemy property. The President delegated his powers of seizure and administration to the Alien Property Custodian. The Act of March 4, 1923, specifically provided that the Custodian might pay the necessary expenses incurred by him in securing the

possession, collection, or control of money or other property seized by him or in protecting or administering the same, out of funds seized by the Custodian. This Court has held that the Custodian was authorized to seize property supposed to belong to an enemy even before an adjudication that it was enemy property, and has recognized that all property seized by the Custodian should be administered by him.

The Act of March 28, 1918, vests the Custodian with all the powers of a common-law trustee in respect of all property seized by him. We submit that Congress intended that the entire cost of administering the office of the Custodian should be borne by the trust funds administered by him. The practice of deducting for administrative expenses a fixed percentage of the trust funds upon their return to the owners had been in force for several years before the passage of the Act of March 4, 1923, and that Act operated as a confirmation of the existing practice.

Moreover, it is universally recognized that a trustee has the right to be reimbursed for the expenses incurred in the administration of the trust estate. This Court has said that proper charges and expenses may be deducted even from property wrongfully seized.

II. The deduction of a flat rate charge of two per cent has been determined by the Custodian to be the lowest amount necessary to cover the expenses in-

curred by him in collecting, protecting, and administering the seized property.

The principal of the trust estate of the petitioners amounted to over $3,000,000, and the estate was administered by the Custodian for over ten years. The amount deducted is about two per cent of the principal returned, and is about five per cent of the total income. We submit that the deduction of the sum of $55,909.83 was in compliance with the terms of the decree of the court which ordered the return of the petitioners' seized property "after deducting therefrom any expenses or disbursements * * * duly made under the authority of the Trading with the Enemy Act and amendments thereto."

The petitioners admit that the Custodian could deduct exact amounts expended in the administration of their property, but contend that they should not be charged "one cent more than the actual expense of protecting or administering such property" or anything on account of the general expenses of the Custodian's office. If deductions can not be made for this purpose, it is obvious that the authority given to the Custodian to pay expenses from trust funds will be largely ineffective. It was unavoidable that the Custodian should make mistakes and seize the property of nonenemies.

The action of the Alien Property Custodian in determining this method and amount is presumed to be reasonable and proper. The presumption of regularity supports the official acts of public officials and in the absence of clear evidence to the

contrary it is presumed that they have properly discharged their official duties.

III. The deduction by the Custodian of a fixed percentage to cover administrative costs or expenses did not deprive the petitioners of their property without due process of law. The Trading with the Enemy Act was passed under Article I, Section 8, clause 11 of the Constitution empowering Congress to declare war and make rules concerning captures on land and water. The power vested in the President to make rules and regulations with respect to the administration of property seized by the Alien Property Custodian included the power to regulate the administrative expenses to be deducted from seized property.

Therefore, the method employed by the Executive Department of deducting a flat rate of two per cent from the petitioners' seized property was the exercise of the discretionary power vested in the President, which is not reviewable. The power conferred by the Act to take enemy-owned property included the authority to seize property believed to belong to an enemy. This Act, and its amendments and the Executive Orders of the President, authorized the Custodian to make the deductions in question, as stated above. The Fifth Amendment does not prevent the exercise of war powers, and the Executive must have wide discretion as to the means to be employed in order to carry out the war successfully.

Moreover, it is not open to the petitioners to raise any constitutional question, as none was raised in the record in the courts below.

ARGUMENT

I

THE ALIEN PROPERTY CUSTODIAN WAS AUTHORIZED BY STATUTE AND EXECUTIVE ORDERS TO DEDUCT FROM THE PROPERTY RETURNED TO THE PETITIONERS A FLAT CHARGE TO COVER THE EXPENSES INCURRED IN COLLECTING, PROTECTING AND ADMINISTERING THEIR SEIZED PROPERTY IN HIS OFFICE

Section 6 of the Trading with the Enemy Act, c. 106, 40 Stat. 411, 415 (p. 41, *infra*), authorized the President to appoint an officer to be known as the "alien property custodian," who should be empowered to receive all money and property in the United States belonging to an enemy, or ally of an enemy, and "to hold, administer, and account for the same under the general direction of the President." The power vested in the President by this section of the Act was delegated by him to the Alien Property Custodian by the Executive Order of October 29, 1917.

Section 7 (c) of the Trading with the Enemy Act, c. 106, 40 Stat. 411, 418 (pp. 41–42, *infra*, provided for the seizure of enemy property, the power being vested in the President. This power likewise was delegated by the President to the Alien Property Custodian by the Executive Order of October 12, 1917, pursuant to the provisions of Section 5 (a) of the Trading with the Enemy Act (p. 40, *infra*, which provided "That the President * * * may make such rules and regulations, not inconsistent

with law, as may be necessary and proper to carry out the provisions of this Act; and * * * may exercise any power or authority conferred by this Act through such officer or officers as he shall direct."

Section 24 of the Amendment to the Trading with the Enemy Act of March 4, 1923, c. 285, 42 Stat. 1511, 1516 (pp. 45–46, *infra*), specifically provided that the Alien Property Custodian might pay the necessary expenses incurred by him, or by any depositary for him, in securing the possession, collection, or control of money or other property seized by him, or in protecting or administering the same, out of the funds seized by the Custodian.

By a provision contained in the Urgent Deficiency Act approved November 4, 1918, c. 201, 40 Stat. 1020 (pp. 41–42, *infra*), Section 7 (c) of the Trading with the Enemy Act was amended in certain particulars, and among other things, by the incorporation therein of a provision that the sole relief and remedy of any person having any claim to any money or other property seized by the Custodian should be that provided by the terms of the Trading with the Enemy Act, and, in the event of the sale of such property, the claim should be limited to and enforced against the net proceeds of the sale.

This Court has held that the Alien Property Custodian was authorized by the Trading with the Enemy Act to seize property *supposed to belong*

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to an enemy, even before an adjudication that it was enemy property (*Central Trust Co.* v. *Garvan,* 254 U. S. 554, 566, 567; *Stoehr* v. *Wallace,* 255 U. S. 239, 245), and "that there is implication in the act that mistakes may be made, but the act assumes 'that the transfer will take place whether right or wrong'," the owner of the property being amply protected by Section 9 of the Trading with the Enemy Act (pp. 42–44, *infra*). *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56, 57.

This Court has also recognized that under the amendment to the Trading with the Enemy Act of November 4, 1918 (c. 201, 40 Stat. 1020), all property seized by the Alien Property Custodian should be administered by him, and that by the Act of March 28, 1918 (c. 28, 40 Stat. 459), (pp. 44–45, *infra*), which provides that the Custodian shall be "vested with all of the powers of a common-law trustee in respect of all property" seized by him, he is given the power to "manage the same as though he were absolute owner thereof." *Central Trust Co.* v. *Garvan, supra.*

The Committee on Interstate and Foreign Commerce of the House of Representatives which drafted the bill which included Section 24, authorizing the deduction of administrative expenses, in its report, p. 6, of the bill to the House of Representatives (H. Rep. 1565, 67th Cong., 4th Sess.), in discussing the purpose of Section 24 of the Act of March 4, 1923, said:

> SECTION 24: The purpose is obviously to permit the Alien Property Custodian to pay all lawful taxes and the necessary expenses incurred by him in securing the possession of or in protecting or administering the property.

We submit that Congress, in passing Section 24, contemplated that the entire cost of administering the office of the Alien Property Custodian was to be borne by the trust funds administered by him. The practice of deducting administrative expenses from the several trust funds administered by the Alien Property Custodian had been in force for several years before the passage of the Act of March 4, 1923. (Report of Alien Property Custodian to the Senate of April 10, 1922, p. VI, Senate Document No. 181, 67th Cong., 2d Sess.; Hearings before the Joint Subcommittees of the Ways and Means Committee and the Interstate and Foreign Commerce Committee, House of Representatives, April 5–14, 1926, on H. R. 10820, pp. 88–93.)

The Act of May 16, 1928, c. 580, 45 Stat. 573, 574, specifically provides that all of the expenses of the *office* of the *Alien Property Custodian* should be paid out of the property held by him.

Even before the enactment of the Act of March 4, 1923, specifically authorizing the deduction from seized property of the expenses incurred by the Alien Property Custodian in securing the possession, collection, or control of and administering any money or other property seized by him as belonging

to an enemy, his right as a common-law trustee to make such deductions to cover the expenses incurred was authorized by the President by the Executive Orders of February 26, 1918 (No. 2813), and July 16, 1918 (No. 2916), and was recognized by the decision of the Comptroller of the Treasury of October 11, 1919 (26 Comp. Dec. 265).

The Executive Order of February 26, 1918, provided that—

> The Alien Property Custodian may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. * * * out of * * * the estate to which such money or other property belongs.

The Executive Order of July 16, 1918, specifically authorized and empowered the Alien Property Custodian "*To determine* and pay all reasonable and proper expenses" out of the property with respect to which such expenses accrued, or out of other property belonging to the same person.

The petitioners concede the right of the Alien Property Custodian to deduct administrative expenses from all seized property, whether rightfully or wrongfully seized. Congress by the Trading with the Enemy Act vested in the President the power to "make such rules and regulations, not inconsistent with law, as may be necessary and

proper to carry out the provisions of this Act." The Act did not prescribe the method to be employed in deducting administrative expenses.

Evidently Congress intended that the President should exercise his discretion with respect to the method to be employed, inasmuch as it vested very broad powers in the President with respect to the seizure, management, and control of property supposed to belong to an enemy. The President, by the Executive Order of July 16, 1918, delegated to the Alien Property Custodian the authority *to determine* and fix the amount of the administrative expenses to be deducted. Pursuant to this authority, the Custodian began the deduction of a flat rate upon property under Section 9, which method was in vogue before the enactment of the Amendment of March 4, 1923.

Moreover, the Alien Property Custodian, under the authority vested in him as a common-law trustee of all seized property, was authorized to deduct from the trust funds a reasonable charge for administering the trusts.

It has been universally recognized that a trustee has the right to be reimbursed for the expenses incurred in the administration of the trust estate. Perry in his treatise on Trusts and Trustees (7th ed.), Vol. 2, Sec. 910, p. 1535, says:

> Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that

there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty. And for losses that may accrue to himself in the proper administration of the trust. Thus a trustee will be reimbursed all his necessary traveling expenses, and all reasonable fees paid for legal advice in the discharge of his duties. And this rule will be applied, although the trust may subsequently be declared void, if the trustees were without blame in the matter. So trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate. * * *

Trustees v. *Greenough,* 105 U. S. 527.

Trustees generally in the United States are allowed reasonable expenses and in addition such compensation as the courts may order. In many of the States the compensation of trustees is fixed by statute at a certain percentage of the trust property. The allowance of compensation of 5 per cent is not uncommon, and in some instances a commission of 10 per cent has been upheld. Perry on Trusts and Trustees (7th ed.), Vol. 2, Sec. 918, p. 1543 *et seq.* In the case of *Barney* v. *Saunders,* 16 How. 535, at page 542, this Court said:

> In England, courts of equity adhere to the principle which has its origin in the Roman law, "that a trustee shall not profit by his trust," and therefore that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services; and in most cases it is gauged by a certain percentage on the amount of the estate.

In the case of *Magruder* v. *Drury,* 235 U. S. 106, this Court refused to disturb a decree of the Court of Appeals of the District of Columbia which allowed to trustees a commission of 5 per cent on the principal and 10 per cent on the income.

This Court has held that even where property was wrongfully seized *proper charges and expenses* may be deducted from such property. In *Henkels* v. *Sutherland, supra,* Max Henkels, an American citizen and resident of the United States, claimed certain property which had been mistakenly seized by the Custodian, and the corpus of the property was returned to him under a decree of court. Henkels contended that he was also entitled to recover the earnings which had accrued from the investment of his principal by the Secretary of the Treasury pursuant to the provisions of Section 12 of the Trading with the Enemy Act. This Court said (p. 302):

> Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and, thereupon, *after deducting proper charges and expenses* and taking into consideration the average amount of such proceeds which remained uninvested in the Treasury, a proportionate allocation made in respect of the proceeds belonging to Henkels for the period of their investment. * * * (Italics ours.)

The petitioners contend that the decision of the court below by implication conflicts with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Vowinckel* v. *Sutherland,* 24 F. (2d) 196. In that case the court determined that the plaintiff was a nonenemy under the Trading with the Enemy Act and that his property had been erroneously seized, and held that the Alien Property Custodian was not authorized to pay out of the plaintiff's seized property certain traveling expenses of an attorney of the Department of Justice, who went to San Francisco to argue the case, and the cost of printing a brief for the Department of Justice. But the court was careful to point out at page 198 that the—

> Expenses incurred * * * were not incurred by the Custodian, or by any depositary for him, in securing the possession, collection or control of the money or property,

and it seems equally manifest that they were not incurred in protecting or administering the same.

We submit that there is no conflict between the decision in the *Vowinckel case* and the decision of the court below in the present case.

The enactment by Congress of the Act of March 4, 1923, was a Congressional ratification, approval and adoption of the practice of the Alien Property Custodian previously established under his powers as a common-law trustee, of deducting a flat-rate charge on the seized property for administrative expenses.

The fact that the practice of assessing charges against all property returned under Section 9 of the Trading with the Enemy Act had been instituted long prior to the Act of March 4, 1923, *supra,* was well known. (Report of Alien Property Custodian to the Senate of April 10, 1922, p. VI, Senate Document No. 181, 67th Cong. 2d Sess.; Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives, December 21, 1922, on H. R. 13496, Sixty-seventh Congress, 4th Sess, pp. 23, 25–27; Hearings before the Joint Subcommittees of the Ways and Means Committee and the Interstate and Foreign Commerce Committee, House of Representatives, April 5–14, 1926, on H. R. 10820, pp. 88–93; Hearings before the Subcommittee of the Committee on Appropriations of the House of Rep-

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resentatives, 70th Cong. 1st Sess., Dec. 13, 1927, pp. 3–16.)

The enactment of the Acts of March 4, 1923, and of May 16, 1928, both of which directed that all expenses should be paid from the trust funds, were Congressional ratifications and confirmations of the prior construction of the authority conferred under the original Trading with the Enemy Act, and particularly in Section 12 which vested in the Alien Property Custodian the rights, powers, and functions of a common-law trustee.

The construction of the statute by the President, who is charged with the duty of enforcing it, and by his delegate, the Alien Property Custodian, should not be overruled unless such construction is clearly erroneous. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14; *United States* v. *Moore*, 95 U. S. 760; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Johnston*, 124 U. S. 236; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Robertson* v. *Downing*, 127 U. S. 607, 613; *United States* v. *Bank of North Carolina*, 6 Pet. 29, 39; *Five Per Cent Cases*, 110 U. S. 471, 484.

As this Court said in *National Lead Co.* v. *United States*, 252 U. S. 140, 147:

> * * * Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. *United States* v. *Bailey*, 9 Pet. 238, 256.

Cf. *Brewster* v. *Gage*, 280 U. S. 327, 337.

II

THE DEDUCTION OF A FLAT-RATE CHARGE OF TWO PER CENT OF THE PRINCIPAL OF THE PROPERTY RETURNED TO PETITONERS WAS PROPER

(a) *The Alien Property Custodian's practice of making a flat-rate charge of 2 per cent is a reasonable exercise of his discretionary powers and should not be upset*

As hereinbefore shown, the President was given very broad powers with respect to the seizure and administration of property supposed to belong to an enemy. The President under his war powers seized the petitioners' property and by the Executive Orders of February 26, and July 16, 1918, directed the Alien Property Custodian to deduct administrative expenses therefrom, and vested in the Custodian the power to determine and fix the amount of such expenses. The Custodian deducted from the property returned to these petitioners two per cent of the principal.

In order that each trust might contribute equably to the expense of administering the several trusts, a fixed percentage has been deducted by the Alien Property Custodian from each trust. The several trusts have contributed to the expenses in the same proportion and the amount deducted from the property returned to these petitioners was proportionately the same as has been deducted from the money and other property returned to other claimants. This procedure is in accordance with the principle

of a proportionate allocation of interest earned upon funds returned as outlined in the *Henkels case*. This deduction was of the lowest amount necessary to cover the costs of administering these trusts. The uniform charge of 2 per cent deducted by the Custodian has been found by him to be the amount necessarily required to collect, protect, and administer the property in the various trusts under his control. (Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, December 13, 1927, pp. 3–16.)

The principal of the trust estate of these petitioners amounted to about three million dollars. (R. 74.) The $55,909.83 deducted is less than 2 per cent of this amount. The administration of this principal involved arranging for and considering an appraisal of the stock seized, the consummation of the sale thereof, and investing the proceeds of the sale, collecting dividends from the stock and income from the bonds, and investing the dividends and income regularly, besides other general details incident to the collection, care, and administration of the property. (R. 74–75.)

The petitioners concede that the Alien Property Custodian might deduct such disbursements or expenditures necessarily made, "such in general as they themselves would have had to pay if in possession of the property." It is obvious that the administration of this property—extending over a

period of ten years—must have required a considerable amount of routine work, as well as the exercise of discretion and judgment. The percentage charged is much less than would ordinarily be allowed to a private trustee for similar services in administering a trust of this size for the long period of time this trust estate was administered by these respondents, and is much less than was paid to the petitioners' trustees for their services with respect to this property before it was seized. (R. 75.)

Inasmuch as the amount deducted was required to meet the total cost of collecting, protecting, and administering the petitioners' seized property, it is submitted that the action of the Alien Property Custodian in deducting the sum of $55,909.83 from the petitioners' seized property was authorized by the Act of March 4, 1923 (c. 285, 42 Stat. 1516), and is in full compliance with the terms of the decree of the Supreme Court of the District of Columbia entered in this case on January 19, 1928 (R. 65–66), which ordered the return of the petitioners' seized property, together with any and all income therefrom and additions and accretions thereto, "after deducting therefrom any expenses or disbursements * * * duly made under the authority of the Trading with the Enemy Act and amendments thereto."

The Alien Property Custodian, pursuant to the Trading with the Enemy Act, seized the property of thousands of persons, and as stated by this Court

in *Haycraft* v. *United States*, 22 Wall. 81, 94, it must have been anticipated that in the indiscriminate seizure of property pursuant to legislation enacted under the war powers of Congress, that "friends as well as foes might suffer." In the administration of these thousands of trusts it was deemed by the Executive Department to be practicable and economical to tax each trust with a uniform charge for administrative expenses which was made the lowest amount possible to cover the administration of the several trusts. It is obvious that if the Custodian had kept an exact account of the expenses incurred with respect to each trust it would have entailed a far greater overhead expense and resulted in a much greater aggregate charge for the administration of the seized property.

It is well known that at the time of the enactment of the Trading with the Enemy Act there was approximately a billion dollars worth of property supposed to belong to enemies located within the territory of the United States and its possessions, which property was seized by the Alien Property Custodian pursuant to the provisions of said Act. (Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives, December 21, 1922, on H. R. 13496, 67th Congress, 4th Sess., pp. 4–5.) The Custodian seized the property of over fifty thousand individuals, partnerships, corporations, companies, associations, or other unincorporated bodies.

The petitioners state in their brief that—

> They do not contest the deduction by the Custodian of all reasonable disbursements or expenditures necessarily made for the purpose of protecting their money and property and which are directly attributable to such money or property; * * *. [Brief of Petitioners, p. 8.]
>
> As stated at the outset of this brief, we concede the right of the Alien Property Custodian to charge against this property all disbursements or expenditures necessarily made for the purpose of protecting and taking care of their money and property; such in general as they themselves would have had to pay if in possession of the property. [Brief of Petitioners, p. 36.]
>
> They deny the right of the Custodian to pay any part of the general expenses or overhead of his office out of their property which was wrongfully or at least mistakenly seized by him, and in particular they contest his right to deduct on that account a percentage of their money and property arbitrarily fixed by him. They contend that as a matter of fact and of law the cost or expense of administering property is not and can not be measured by the amount of value of that property, and that even if deduction of some percentage be permissible, the Custodian can not fix arbitrarily upon what that percentage shall be. [Brief of Petitioners, pp. 8–9.]

In other words, they contend that the Alien Property Custodian can not uniformly tax all

seized property with a certain fixed charge for administrative expenses but must keep a cost accounting system and definitely determine the actual cost incurred with respect to each item of seized property and assess each parcel of property with the actual cost incurred with respect thereto.

To upset this practice which has been in vogue for many years would result in infinite mischief leading to great confusion and extensive litigation.

In *United States* v. *Bank of North Carolina*, 6 Pet. 29, 39, *supra*, this Court said:

> It is not unimportant, to state, that the construction, which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent, who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction; and could not now be disturbed, without introducing a train of serious mischiefs. We think, the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it, would justify us in yielding to it as a safe and reasonable exposition.

The petitioners contend that the bringing of this suit restricted the respondents from thereafter

deducting administrative expenses (Brief of Petitioners, pp. 26, 27), inasmuch as Section 9 of the Trading with the Enemy Act (c. 285, 42 Stat. 1511), provides that "If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States * * * until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied * * * or suit otherwise terminated."

Section 9, which includes the above-quoted provision, was reenacted in the Amendment of March 4, 1923, which amendment included Section 24, which provides that the Alien Property Custodian may pay all taxes assessed against seized property held by him or the Treasurer of the United States as well as "the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same."

Under the theory of the petitioners the mere filing of a suit would automatically stop the Alien Property Custodian from paying taxes which had lawfully accrued upon seized property or deducting necessary administrative expenses incurred in administering such property. Such a construction of the Act would in effect defeat the purpose of Section 24. Sections 9 and 24 being a part of the Act of March 4, 1923, it follows that they must be con-

strued together. The restrictions of Section 9 undoubtedly prohibit the Alien Property Custodian from selling the property claimed in a suit or converting it into property of a different character, but it certainly can not be construed to prohibit the payment of taxes and the deduction of necessary administrative expenses.

It is a general rule that in the construction of a statute the intention of the lawmakers is to be deducted from the whole statute and every material part thereof. *Kohlsaat* v. *Murphy,* 96 U. S. 153; *Pennington* v. *Coxe,* 2 Cranch, 34; *Neal* v. *Clark,* 95 U. S. 704; *Peck* v. *Jenness,* 7 How. 612, 622.

(*b*) *The action of the Alien Property Custodian in making a charge of two per cent, from the property returned, must be presumed to be proper and reasonable under the presumption of regularity which supports the official acts of public officers.*

The petitioners assert that the Custodian unlawfully and wrongfully deducted as administrative expenses the amount here claimed. The Custodian admitted the deduction and stated that he had paid the money in question into a fund maintained by him to cover payments for expenses incurred in administering money and other property seized under the Trading with the Enemy Act. No evidence was introduced on this point by either party.

It must be presumed that the action of the President, by his Executive Orders in instructing the Alien Property Custodian to deduct administrative

expenses from seized property and to determine the amount thereof and the action of the Custodian pursuant to such orders in charging a flat rate of 2 per cent upon all property returned to claimants were regular and in accordance with appropriate authority. This Court in *United States* v. *Chemical Foundation,* 272 U. S. 1, at page 14, said:

> The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. * * *

The duty imposed upon the Custodian actually was to conduct a tremendous business without profit, which at the same time should support itself except for minor items. This enterprise did not develop in an orderly manner over a period of time, but sprang into existence in the midst of the chaotic conditions induced by war.

In the performance of his duty the Custodian within a few months seized hundreds of parcels of property, the capital stock of many corporations, and stupendous sums of money. After seizures were made numerous claims for property erroneously taken were filed and allowed, with the result that return of estates to successful claimants began almost simultaneously with the establishment of the office.

Expenses incurred in securing the possession, collection, or control of any money or other property and in protecting or administering the same,

accrued and had to be paid. There was no time for expert accountants to develop a complicated system of accounting, nor was there any way of knowing how long the war would last and the Custodian be compelled to hold property. All that was known was the value of the properties seized. Therefore, the only feasible method of providing funds for the payment of expenses was to figure a reasonable charge against the estate based upon the only known quantity, the value. It developed that the system evolved at the beginning was a just and satisfactory one, and it has been followed to the present date.

Petitioners contend that a system of accounting of superlative refinement should have been adopted. Such a system would have necessitated greatly increased personnel and other expense, and would have imposed an additional and oppressive burden upon the properties held, which the Custodian was not justified in inaugurating.

No charges of fraud or misfeasance have been made against the Custodian in his administration of the estate. Therefore he must be assumed to have acted properly. When a public officer acts with ordinary caution and good faith, his action should not be disturbed.

It is obvious that the deduction for the cost of administering an estate of approximately $3,000,000 for ten years could not well be less than $55,909.83.

III

THE DEDUCTION BY THE ALIEN PROPERTY CUSTODIAN OF A FIXED PERCENTAGE FROM SEIZED PROPERTY TO COVER ADMINISTRATIVE EXPENSES DID NOT CONSTITUTE A TAKING OF THE PETITIONERS' PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT

This Court in *Stoehr* v. *Wallace, supra,* at pages 241–242, 245, held that the Trading with the Enemy Act as originally enacted, as well as the Amendment of March 28, 1918, vesting in the Alien Property Custodian all of the powers of a common-law trustee, was constitutional. The Court said:

> The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, c. 106, 40 Stat. 411, or as since amended, March 28, 1918, c. 28, 40 Stat. 459, 460; November 4, 1918, c. 201, 40 Stat. 1020; July 11, 1919, c. 6, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977, is strictly a war measure and finds its sanction in the constitutional provisions, Art. I, sec. 8, cl. 11, empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Brown* v. *United States,* 8 Cranch. 110, 126; *Miller* v. *United States,* 11 Wall. 268, 305.
>
> It is with parts of the act which relate to captures on land that we now are concerned. They invest the President with extensive powers respecting the sequestration, custody and disposal of enemy property. By section 5 he is in terms authorized to exercise "any" of these powers "through such officer

> or officers as he shall direct." By section 6 he is authorized to appoint and "prescribe the duties of" an officer to be known as the Alien Property Custodian. * * *
>
> * * * * *
>
> That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy owned, if adequate provision be made for a return in case of mistake, is not debatable. * * *

In view of the extensive powers vested in the President respecting the sequestration, custody and disposal of property believed to be enemy-owned and of the power vested in him by Section 6 of the Trading with the Enemy Act to "appoint" and "prescribe the duties of" the Alien Property Custodian, and of the power vested in him by Section 5 to "make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act," and of his power to exercise his authority "through such officer or officers as he shall direct," he unquestionably had the right to fix and determine the amount of the administrative expenses to be deducted from seized property or to delegate such power to the Alien Property Custodian, in the absence of any provision in the statute fixing the amount of administrative expenses to be deducted. The statute unquestionably vested the Executive with the power

to deduct administrative expenses. The method to be employed in making such deductions was discretionary. The President delegated the power to the Custodian by the Executive Order of February 26, 1918, to deduct administrative expenses, and by the Executive Order of July 16, 1918, he delegated to the Custodian his power and authority to determine and fix the amount of administrative expenses. Pursuant to such authority, the Custodian adopted the method of deducting a flat rate percentage from seized property returned under Section 9.

In the case of *United States* v. *Chemical Foundation,* 272 U. S. 1, this Court upheld the private sale by the Alien Property Custodian of some 4,900 patents, which was made under the authority of an Executive Order issued by Frank L. Polk, delegate of the President. The property under such sale concededly was sold for a grossly inadequate price. The discretionary power vested in the Executive by Section 12 to authorize private sales of property seized by the Alien Property Custodian is analogous to the authority vested in the President by Section 5(a) of the Act to make "such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act."

Since this Court has declined to interfere with the discretionary act of the President with respect to authorizing private sales of enemy property,

which were concededly made for a grossly inadequate price, there would seem to be no constitutional reason for questioning the discretionary power of the Executive Department in deducting a flat charge from seized property.

The words "without due process of law" have long been held to be "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 245.

It may be that in this case the property of petitioners has been required to bear more or less of the burden of administering all the estates held than some others, but unless it be demonstrated that the deduction from this property made to cover administrative expense resulted in a substantial deprivation to petitioners, and an absence of distributive justice, these petitioners can not contend that their property has been taken without due process of law. There are no facts in the record nor allegations in the pleadings in this case which justify the assertion of petitioners.

In *Highland* v. *Russell Car Co.*, 279 U. S. 253, a section of another war-time measure, the Lever Act, was construed. The sole question was whether the constitutional rights of an American citizen were infringed by the enforcement of the Act and orders which prevented him from selling his coal for more

than the prices he was entitled to receive under the Act. The provisions of the statute were held not to be so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment. The Court said, at pp. 261, 262:

> Under the Constitution and subject to the safeguards there set for the protection of life, liberty and property * * * the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on.

Furthermore the Constitution permits a certain latitude in times of a national emergency. In *Highland* v. *Russell Car Co., supra,* in discussing freedom to contract, the Court said (p. 261):

> It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired. * * * Generally speaking, that right is protected by the due process clauses of the Fifth and Fourteenth Amendments. (Citing cases.) *It is also well-established by the decisions of this court that such liberty is not absolute or universal and that Congress may regulate the making and performance of such contracts when-*

> *ever reasonably necessary to effect any of the great purposes for which the national government was created.* (Italics ours.)

An Act adopted and held valid under the war powers conferred by the Constitution must be flexible to the extent that a governmental agency may be permitted to determine just and proper expense necessary in administering property held thereunder on the only basis practicable. Nor is it permissible to construe Section 24 apart from the body of the Act. It is too well settled to require citation of authorities that a statute must be construed as a harmonious whole, and that one portion must not be construed so as to annul and destroy another.

Moreover, we submit that it is not open to the petitioners to raise any constitutional question, as it is well settled that this Court will not review a constitutional question unless the question was either ruled upon by the trial court or a ruling requested and declined. *Cornell* v. *Green,* 163 U. S. 75, 78; *Richards* v. *Michigan Central Railroad Company,* 186 U. S. 479.

The record must show that the constitutional question was raised for the consideration of the District Court. *Paraiso* v. *United States,* 207 U. S. 368, 370; *Arkansas* v. *Schlierholz,* 179 U. S. 598.

The record in this case does not show that a constitutional question was raised in the courts below. (R. 69–73.)

CONCLUSION

The decree of the Court of Appeals of the District of Columbia entered herein on June 3, 1929, should, therefore, be affirmed.

Respectfully submitted.

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April, 1930.

APPENDIX

STATUTES

Trading with the Enemy Act:

SECTION 5 (a). (c. 106, 40 Stat. 411, 415.) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section four hereof, and to perform any act made unlawful without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and *he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.* (Italics ours.)

SECTION 6. (c. 106, 40 Stat. 415.) That the President is authorized to appoint * * * an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said Custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. * * * The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act.

SECTION 7 (c). (c. 201, 40 Stat. 1020.) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States. (Act of October 6, 1917, as amended November 4, 1918.)

Section 9 (a). (c. 285, 42 Stat. 1511.) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest

therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the

United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. (Act of October 6, 1917, as amended March 4, 1923.)

SECTION 12. (c. 28, 30 Stat. 460.) The Alien Property Custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchas-

ing property from the Alien Property Custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the Alien Property Custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The Alien Property Custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

SECTION 24. (c. 285, 42 Stat. 1516.) The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in

respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act. (Act of March 4, 1923.)

EXECUTIVE ORDERS

February 26, 1918 (No. 2813):

(a) The Alien Property Custodian may appoint and clothe with necessary power and authority such agents, bailees, and attorneys in fact as he may find to be necessary or proper to carry out the provisions of the "Trading with the Enemy Act" and the Executive orders, rules, and regulations heretofore, hereby, or hereafter made, and prescribe the duties and fix the compensation of such agents, bailees, and attorneys in fact; and any depositary designated by the Alien Property Custodian may be appointed as such agent, bailee, or attorney in fact. And the Alien Property Custodian may require bonds of such agents, bailees, and attorneys in fact and fix the penalty and conditions thereof.

(b) *The Alien Property Custodian may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs.*

(c) The Alien Property Custodian may authorize depositaries designated by him and

agents, bailees, and attorneys in fact appointed by him to deduct all expenses authorized or approved by the Alien Property Custodian, including the compensation of such depositaries, agents, bailees, and attorneys in fact, from any moneys collected by them and the payment by them to the Alien Property Custodian or into the Treasury of the United States of the net amount remaining in their hands. (Italics ours.)

July 16, 1918 (No. 2916):

To determine and pay all reasonable and proper expenses incurred in or about or with respect of the exercise of any of the powers and authority vested in the Alien Property Custodian or any depositary for him, including expenses that may be incurred in or about securing possession, custody or control of any such property, and including also taxes and other charges heretofore or hereafter lawfully assessed upon or against such property by any body politic * * *.

This Executive Order further provided that—

All costs and expenses incurred by reason of or in respect of, and all claims and demands of every kind, character, and description based upon or arising out of, the custody, management, administration, protection, preservation, and control of any such property and the conduct or other operation of any such going business or other undertaking and the sale or other disposition of any such property, shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which, on account of which, or in respect of which such cost, expenses, claim, or demand shall have been incurred and shall have

arisen or been created; provided that whenever such property or the income therefrom or the assets of any such going business or other undertaking shall be insufficient therefor, such cost, expenses, claim, or demand shall be charged thereto, but may be paid or satisfied out of money or other property received from, or as the property of, the same enemy.

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